In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 881

RICHARD C. BARNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Arizona, petitioner, charged in one count with offering a bribe to a federal employee and in a second count with giving a bribe to a federal employee, was convicted on the second count under 18 U.S.C. 201(b)(3); he was sentenced to six months' imprisonment. The court of appeals affirmed (Pet. App.).

Petitioner contends that it was improper for him to be charged with both offering and giving a bribe since the same bribe was offered at one time and given at another.[1] He also argues that statements made di-

[1] Petitioner was charged with offering the bribe on May 26, 1969, and giving the bribe on June 23, 1969.

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rectly after he gave the bribe were inadmissible because made without being warned of his rights under *Miranda* v. *Arizona*, 384 U.S. 436.

1. 18 U.S.C. 201(b) reaches "[w]hoever * * * gives, offers, or promises anything of value to any public official * * * with intent * * * to induce [him] * * * to do or omit to do any act in violation of his lawful duty * * *." This provision has consistently been construed as establishing the distinct crimes of offering and giving a bribe, requiring different proof even when parts of a single course of conduct. *United States* v. *Michelson*, 165 F. 2d 732 (C.A. 2), affirmed on other grounds, 335 U.S. 469; *Lunsford* v. *United States*, 200 F. 2d 237 (C.A. 10); *United States* v. *Lubomski*, 277 F. Supp. 713, 716–718 (N.D. Ill.); *United States* v. *Kemmel*, 188 F. Supp. 736, 740 (M.D. Pa.). Consequently, there was no error in charging petitioner in separate counts. See *Blockburger* v. *United States*, 284 U.S. 299, 302. As noted, petitioner was convicted on only the second count.

2. After petitioner had given money to the federal employees (immigration officials), he stated that he wanted them to permit aliens to remain in the United States and work for him even though they had entered illegally (Tr. 33–35; 59–61). The statements were voluntarily made in petitioner's tool shed before his arrest; they were not offered in any custodial or coercive situation to which the *Miranda* principles apply. See *Hoffa* v. *United States*, 385 U.S. 293, 304. In any event, handing money to the federal employees did

not constitute an offense until it was clear that petitioner's purpose was to induce the officials to refrain from performing their lawful duty in preventing an alien's unauthorized presence in the United States. So viewed, petitioner's statements were part of the offense itself. See *Warszower* v. *United States*, 312 U.S. 342, 345–347.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1970.

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